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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

FREDERICK BITZER, ET AL.,
Petitioners,

v.

DONALD MATTHEWS, ET AL.,
Respondents.

BRIEF ON ATTORNEYS' FEES FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND, AND THE AMERICAN CIVIL LIBERTIES UNION, AS *AMICI CURIAE*

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INTEREST OF *AMICI CURIAE*

Amici are non-profit organizations whose common goal is to secure the civil right of American citizens to equal treatment under law, including at the hands of state officials and agencies. Each therefore has a vital interest in the resolution of the issue of whether Congress may authorize the award of attorneys' fees as part of the court costs to be assessed under Title VII against state employers who engage in discriminatory employment practices.*

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* This brief is filed, pursuant to Rule 42(2), with the consent of the parties. *Amici* previously filed a brief advising the Court of their views on the backpay and Eleventh Amendment issues in No. 75-251; and the letters of consent have been previously filed with the Clerk.

INTRODUCTION

The question in No. 75-283 is whether Congress has the constitutional power to authorize federal courts to award attorneys' fees as part of the taxable costs when they enjoin state officials from committing discriminatory employment practices.[1]

Amici curiae file this brief as a companion to their brief filed in No. 75-251, which dealt with the constitutionality of a backpay award in this case. In that brief we discussed the proposition that state immunity, either at common law or by the terms of the Eleventh Amendment, does not extend to Congress' authority to create causes of action, pursuant to its enumerated and supreme powers under the Constitution, which result in awards against the states. We also argued that, even if Congress' power was so limited prior to 1868, the adoption of the Fourteenth Amendment provided the necessary authorization in this case.[2]

If an award of backpay in a Title VII suit against state officials is constitutionally valid, an award of attorneys' fees is *a fortiori* constitutional. But even if the authorization of backpay were held beyond the power of Congress, award of attorneys' fees against state officials would still be appropriate for the reasons set forth in this brief.

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[1] Plaintiffs, having gained injunctive relief in this case, requested attorneys' fees, pursuant to 42 U.S.C. § 2000e-5(k), in the amount of $6,275, for 137.5 hours at rates of $50 and $30 per hour. The Court of Appeals held that the state defendants are not immune from such a request. *Fitzpatrick* v. *Bitzer*, 519 F.2d 559, 571-72 (2d Cir. 1975).

[2] This second argument was developed in detail in the brief *amicus curiae* filed on behalf of the United States.

I. ATTORNEYS' FEES, LIKE OTHER ITEMS OF COSTS, ARE PERMISSIBLE INCIDENTS OF LITIGATION AND MAY BE ASSESSED AGAINST THE STATE DEFENDANTS.

The defendants in this case do not claim that Congress may not authorize awards of attorneys' fees as costs against employers in general who are guilty of employment discrimination. Rather, the defendants' sole challenge is that, as state officials, they alone are not subject to such costs. This argument is foreclosed by the decision in *Fairmont Creamery Co.* v. *Minnesota*, 275 U.S. 70 (1927).

A. A half-century ago, Minnesota made the same explicit claim that, as a sovereign state, it could not be taxed with the prevailing party's costs of suit. This Court held that a state can be made to bear the expenses of proceedings in federal court:

> But is the state to be regarded as the sovereign here? This court is not a court created by the state of Minnesota. The case is brought by a writ of error issued under the authority of the United States by virtue of the Constitution of the United States. It is not here by the state's consent but by virtue of a law, to which it is subject. Though a sovereign, in many respects, the state when a party to litigation in this court loses some of its character as such.

275 U.S. at 74. The practice of taxing costs against states in the same way as against other litigants has been invariable and has continued to this day.[3]

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[3] Several of the State *amici* (though not the defendants) attempt to limit *Fairmont Creamery* on the ground that the case began as a criminal prosecution brought by the State of Minnesota. But the Court made it clear that no such limitation was intended, and that the power to tax costs against any litigant attaches in all cases properly within the Article III jurisdiction of a court of the United States. Thus, the Court "treat[ed] the state just as any other

B. The attorneys' fee issue in this case is settled by the decision in *Fairmont Creamery* because such fees are costs of litigation. They are "incidents of the hearing," which "attach to the regular jurisdiction" of a court of the United States under Article III of the Constitution. 275 U.S. at 77.

The equivalence of costs and fees is established by function and tradition. Both are closely related to the court's power and obligation to manage the litigation before it.[4] And their amount varies with the nature,

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litigant, and impos[ed] costs on it as such," 275 U.S. at 77; and it referred to 129 cases, dating back to 1860, which show that "the invariable practice has been when the judgment has been against a state in both civil and criminal cases to adjudge costs against it." *Id.*

The Court has continued to apply the *Fairmont Creamery* rule, without distinction, to tax costs against states, state agencies, and state officials; in cases coming up from the federal courts and from the state courts; and in cases where the states are plaintiffs and in cases where the states are defendants. *See, e.g.*, the judgments in *Jenkins* v. *Georgia*, 418 U.S. 153 (1974); *Spence* v. *Washington*, 418 U.S. 405 (1974); *Epperson* v. *Arkansas* 393 U.S. 97 (1968); *Allen* v. *State Board of Elections*, 393 U.S. 544 (1969); *Connor* v. *Williams*, 404 U.S. 549 (1972); *Chapman* v. *Meier*, 420 U.S. 1 (1975); *McClanahan* v. *State Tax Commission of Arizona*, 411 U.S. 164 (1973); *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975); *Cherokee Nation* v. *Oklahoma*, 397 U.S. 620 (1970).

The Question has been raised again recently, and the rule of *Fairmont Creamery* reiterated by two courts of appeals. *Boston Chapter NAACP, Inc.* v. *Beecher*, 504 F.2d 1017, 1028 (1st Cir. 1974), *cert. denied*, 421 U.S. 910 (1975); *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1974).

[4] For example, if attorneys' fees may not be assessed against state officials, there is no check even on dilatory tactics or other forms of litigation in bad faith. Yet this Court has affirmed an award against the Governor and other officials of Alabama, *Sims* v. *Amos*, 340 F.Supp. 691 (M.D. Ala. 1972), *aff'd*, 409 U.S. 942 (1972), and has subsequently pointed to the bad faith present in the case. *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 270 n. 46 (1975). *Compare* Rule 37, Fed. R. Civ. P., which specifically authorizes courts to tax attorneys' fees as part of the costs of obtaining discovery from a recalcitrant litigant.

length and complexity of the litigation itself.[5]

In keeping with their functional equivalence, fees have traditionally been regarded by Congress as in the nature of costs. It is true that the general American rule treats attorneys' fees as a *non-taxable* cost; but, as this Court only recently reiterated in *Alyeska*, that is a matter for Congressional determination. 421 U.S. at 270-71. In Title VII Congress has chosen to authorize courts to allow "a reasonable attorney's fee as part of the costs." 42 U.S.C. § 2000e-5(k).[6]

Attorneys' fees have traditionally been included among those costs regulated by general cost statutes, such as the Act of August 23, 1842, which gave this Court power (5 Stat. 518):

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[5] A recurring theme of the state immunity cases has been concern about the potentially ruinous effect unregulated monetary awards might have upon state treasuries. This concern was most acute in cases like *Hans* v. *Louisiana*, 134 U.S. 1 (1890), involving the size of the state's debt, but it was also alluded to in *Edelman* v. *Jordan*, 415 U.S. 662, 665-66 (1974). In this respect, while an attorneys' fee award will ordinarily be larger than the other costs taxed in a given case, both are invariably so limited that neither could disrupt a state treasury. Indeed, most attorneys' fee awards are miniscule compared with the dollar expense of complying with an injunction. Moreover, many cases involve other taxable costs which are larger than most attorneys' fee awards. *Compare* the $6,750 attorneys' fee requested in this case with the costs awarded *in this Court alone* in such cases as *Milliken* v. *Bradley*, 418 U.S. 717 (1974) ($20,329.60); *Keyes* v. *School District No. 1*, 413 U.S. 189) (1973) ($28,905.48). *See also* the listing of attorneys' fees involved in other cases involving state officials in Note, *Attorneys' Fees and the Eleventh Amendment*, 88 HARV. L. REV. 1875, 1896 n. 126 (1975).

[6] *See also, e.g.*, S. Rep. No. 94-295, 94th Cong. 1st Sess. 41 (1975); 7 U.S.C. §§ 210(f), 499g(b); 15 U.S.C. §§ 15, 77k(e), 77www(a), 78i(e), 78r(a); 17 U.S.C. § 116; 42 U.S.C. §§ 2000a-3(b); 45 U.S.C. § 153(p); 47 U.S.C. § 206; 49 U.S.C. § 16(2); 18 U.S.C. § 1964(c); 20 U.S.C. § 1617; 7 U.S.C. § 2305(c); 12 U.S.C. § 1975; 15 U.S.C. §§ 72, 298(b); 42 U.S.C. § 1857h-2(d); 49 U.S.C. §§ 8, 908(b), 908(e); 33 U.S.C. §§ 1365(d), 1415(g)(4); 42 U.S.C. § 4911(d); 46 U.S.C. § 1227.

> to make and prescribe a table of the various items of costs which shall be taxable and allowed in all suits, to the parties, their attorneys, solicitors, and proctors, to the clerk of the court, to the marshal of the district, and his deputies, and other persons serving processes, to witnesses, and to all other persons whose services are usually taxable in bills of costs.

The same pattern was followed in 1853, when Congress itself undertook to set attorneys' fees, and has continued to the present in the form of 28 U.S.C. §§ 1920 and 1923. Under these provisions, attorneys' fees are retained as taxable costs.

The virtual identity of fees and other items of costs is properly conceded by *amici* Pennsylvania *et al.* (Brief, p. 25): "costs taxed against the state, however minimal, nevertheless are paid from the state treasury, as are attorneys' fees awarded against the state." From this, these state *amici* conclude flatly that "*Fairmont Creamery* should be explicitly overruled." We agree with these State *amici* that the attorneys' fee portion of the judgment below cannot be reversed unless this Court is to overrule *Fairmont Creamery* and leave states and state officials—unlike any other party—immune from the costs of filing, service, court transcripts, and proceedings before special masters.[7] Nothing in the Constitution, our federal system, and an unbroken century of judicial practice commands such an anomalous result.

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[7] The position of the state officials would even grant them immunity from being taxed with the expenses of reference to a master under Rule 53, Fed. R. Civ. P., notwithstanding the critical role of such procedures in assuring speedy relief in Title VII cases. 42 U.S.C. § 2000e-5(f)(5).

II. EVEN IF ATTORNEYS' FEES WERE NOT TO BE CONSIDERED AS PART OF THE TAXABLE COSTS *PER SE*, THE ELEVENTH AMENDMENT DOES NOT BAR FEE AWARDS AGAINST THE STATE DEFENDANTS.

Congress' authorization of award of attorneys' fees in successful Title VII actions against state employers is essential to suit against state officials under *Ex parte Young* and constitutes a permissible ancillary effect under *Edelman* v. *Jordan*.

A. The formulation of effective remedies has been of central concern to Congress and the federal courts in their enforcement of federal rights, especially civil rights. *Louisiana* v. *United States*, 380 U.S. 145 (1966); *Bell v. Hood*, 327 U.S. 678 (1946); *see Virginian Ry. Co.* v. *System Federation*, 300 U.S. 515 (1937).

This concern was reflected in *Ex parte Young*, 290 U.S. 123 (1908), which enunciated a doctrine that has been called "indispensable to the establishment of constitutional government and the rule of law." C. Wright, *Handbook of the Law of Federal Courts* 186 (2d ed. 1970). The suability of state officers, established by *Ex parte Young*, is no minor exception to the Eleventh Amendment; rather, it is a fundamental mechanism for enforcing rights created by the Constitution and implemented by Congress to protect citizens against acts done in the name of their state government. As this Court said in *General Oil Co.* v. *Crain*, 209 U.S. 211, 226 (1908), decided the same day as *Ex parte Young*:

> Necessarily to give adequate protection to constitutional rights a distinction must be made between valid and invalid state laws, as determining the character of the suit against state officers. And the suit at bar illustrates the necessity. If a suit against state officers is precluded in the national courts by the 11th Amendment to the Constituion, and may be

> forbidden by a state to its courts, as it is contended in the case at bar that it may be, without power of review by this court, it must be evident that an easy way is open to prevent the enforcement of many provisions of the Constitution; and the 14th Amendment, which is directed at state action, could be nullified as to much of its operation.[8]

Nowhere is this more true than in this case. In 1972, when Congress surveyed the results of eight years' experience with Title VII, the chief flaw was that public employees were not covered. Congress recognized the need to provide an effective remedy for the 10 million state and local government employees who it found were victims of "widespread discrimination against minorities . . . perpetuated by the presence of both institutional and overt discriminatory practices." H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 17 (1971). Congress therefore extended the coverage of the anti-discrimination provisions of Title VII to state and local government employers (and to the federal government).

The enforcement mechanism chosen by Congress sought to accommodate the prerogatives of the states, while recognizing that the success of the law would depend primarily upon private enforcement.[9] For example,

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[8] Nor did the Court regard this as a fanciful possibility, for it was fully aware that government officials may misuse their power even where they do not deliberately set out to interfere with Constitutional rights:

> Zeal for policies, estimable, it may be, of themselves, may overlook or underestimate private rights. The swift execution of the law may seem the only good, and the rights and interests which obstruct it be regarded as a kind of outlawry. *See* Ex parte Young, where this subject is fully discussed and the cases reviewed.

209 U.S. at 227.

[9] Congress was, of course, not required to forego principal reliance upon private enforcement. The alternative would have been an

Congress required that a state employee complaining of discrimination submit his complaint to the Attorney General of the United States for 180 days before instituting a civil action; and that a discrimination complaint arising in a state having an enforcible anti-discrimination law be deferred for 60 days to the appropriate state agency. 42 U.S.C. §§ 2000e-5(c) and (d).

Congress also recognized that authorizing private enforcement was useless without providing the means to obtain counsel by providing for the award of reasonable attorneys' fees. In so implementing Title VII, Congress chose the very method approved most recently by this Court in *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 415 (1975), where this Court determined that the "great public interest in having injunctive actions brought could be vindicated only if successful plaintiffs, acting as 'private attorneys general,' were awarded attorneys' fees in all but very unusual circumstances." *See also Newman* v. *Piggie Park Enterprises*, 390 U.S. 400 (1968).[10]

In Title VII actions against state employers, Congress determined that enforcement of such fundamental federal civil rights cannot be left to the charitable instincts of lawyers or private citizens. Yet the state officials here

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enormous federal bureaucracy, a route followed in the 1870's, when Congress placed principal reliance for enforcement of the new voting rights on criminal prosecutions in the federal courts. The result in 1873 alone was a total of nearly 1271 prosecutions in the Confederate and Border states at a staggering cost of $3.2 million. M. Berger, EQUALITY BY STATUTE 8 (1967); Act of June 10, 1872, 17 Stat. 348.

[10] Experience has shown that there is no comparable alternative method of providing counsel. Reliance upon the contingent fee system common in some commercial litigation, or upon compulsory appointment of counsel without compensation, would be relatively valueless here. The United States could itself underwrite counsel for successful plaintiffs suing state employers. This method was considered extensively and rejected for obvious rasons in school cases in the Education Amendments of 1972, 20 U.S.C. § 1617. *See, e.g.*, 117 CONG. REC. S.5327-28 (April 21, 1971), 5537 (April 23, 1971).

argue that the attorneys' fees required by the "strong public interest in having injunctive actions brought under Title VII, to eradicate discriminatory employment practices," 422 U.S. at 415, cannot touch them. To say that is to destroy the meaning of *Ex parte Young* and Section 5 of the Fourteenth Amendment.[11]

B. *Edelman* acknowledges that the difference between relief barred by the Eleventh Amendment and that permitted under *Ex parte Young* is often subtle, 415 U.S. at 667. While characterizing the Eleventh Amendment as a protection of the state treasury from potentially ruinous money awards, *Edelman* recognizes that many forms of equitable relief have great fiscal impact on state treasuries; but such an "ancillary effect" is a "permissible consequence" of *Ex parte Young*. 415 U.S. at 668. *Edelman* essentially draws the line between "a monetary loss resulting from a past breach of legal duty on the part of the defendant state officials" (direct effect), and payments which are a necessary consequence of the suit itself (ancillary effect). 415 U.S. at 668.

The distinction is decisive in this case. The normal incidents and consequences of a federal court action—*e.g.*, filing costs, witness fees, and otherwise properly

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[11] As this Court recognized in upholding an award of attorneys' fees in a labor union democracy case, *Hall* v. *Cole*, 412 U.S. 1, 13 (1973), *quoting* 462 F.2d 777, 780-81 (2d Cir. 1972):

> [N]ot to award counsel fees in cases such as this would be tantamount to repealing the Act itself by frustrating its basic purpose. It is difficult for individual members of labor unions to stand up and fight those who are in charge. The latter have the treasury of the union at their command and the paid union counsel at their beck and call while the member is on his own. . . . Without counsel fees the grant of federal jurisdiction is but a gesture for few union members could avail themselves of it.

If anything, the concept described in *Hall* v. *Cole* applies with even more force when one of the parties is a lone citizen or group of citizens and the other is a state.

awarded attorneys' fees—are so clearly "ancillary" in nature as to seem to render the state officials' assertions of an Eleventh Amendment bar or immunity frivolous.[12]

Such incidents of litigation are not in the nature of actions on pre-existing state debts; they are not "a monetary loss resulting from a past breach of legal duty." They do not derive from the prior conduct of the state or its officials which gave rise to the underlying Title VII cause of action. They are not designed to compensate, nor to provide reparations for, the victims of discrimination. Except for the fact that such costs of litigating also involve dollars, there is *no* resemblance to the "award of damages against the State" which is forbidden by *Edelman*. 415 U.S. at 668.

Rather, the attorneys' fees at issue here are in the nature of an incidental expense of the litigation itself. Congress has authorized such fees as the essential means to permit the underlying Title VII cause of action to proceed. In sum, the award of attorneys' fees here would have only "an ancillary effect on the state treasury [which] is a permissible . . . . consequence of the principle announced in *Ex parte Young*." 415 U.S. at 668.

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[12] Since *Edelman*, four circuits have upheld awards of attorneys' fees against state officials. *Class* v. *Norton*, 505 F.2d 123 (2d Cir. 1975); *Fitzpatrick* v. *Bitzer*, *supra*; *Souza* v. *Travisono*, 512 F.2d 1137 (1st Cir. 1975), *Thonen* v. *Jenkins*, 517 F.2d 3 (4th Cir. 1975); *Bond* v. *Stanton*, No. 75-1459 (7th Cir. Jan. 7, 1976).

Two circuits, however, have found such fee awards indistinguishable from the retroactive welfare payments condemned in *Edelman*. *Skehan* v. *Board of Trustees*, 501 F.2d 31 (3d Cir. 1974) *vacated*, 421 U.S. 983 (1975); *Jordon* v. *Gilligan*, 500 F.2d 701 (6th Cir. 1974), *cert. denied*, 421 U.S. 991 (1975). The two courts which have denied attorneys' fees against state officials in reliance on *Edelman* have focused only on the fact that money is to be paid from the state treasury, and have ignored the distinction recognized by the court of appeals in this case—the distinction between direct and ancillary effects on state treasuries.

CONCLUSION

For the reasons set forth above, the judgment of the Court of Apeals, insofar as it uphold the power of Congress to authorize attorneys' fees in successful Title VII actions against state employers, should be affirmed.

Respectfully submitted,

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